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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SUSAN SWANSON, et al., Plaintiffs, v. USPROTECT CORPORATION, Defendant.	Case Number C 05-602 JF (HRL) ORDER[1] GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [re: doc. no. 52]

Defendant moves for partial summary judgment[2] on Plaintiffs' claims. The Court has considered the briefing submitted by the parties as well as the oral arguments presented at the hearing on September 15, 2006.[3] For the reasons discussed below, the motion will be granted in

[1] This disposition is not designated for publication and may not be cited.

[2] While Defendant's motion states that it is for "summary judgment or, alternatively, partial summary judgment," the motion addresses only certain of Plaintiff's claims. Accordingly, the motion properly is characterized as a motion for partial summary judgment.

[3] With the consent of counsel for the parties, issuance of the instant order was delayed pending the decision of the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, ---, 155 P.3d 284, ---, 12 Wage & Hour Cas.2d (BNA) 833, 895 (2007), discussed below.

part and denied in part.

I. BACKGROUND

Plaintiffs Susan Swanson, Shane McGuire and Claudia McGuire filed this putative class action in the Santa Clara Superior Court on August 17, 2004, alleging that Defendant USProtect Corporation ("USProtect") had committed violations of California's wage and hour laws and unfair competition laws. Plaintiffs did not serve their complaint, but subsequently filed and served a first amended complaint. Shortly thereafter, USProtect removed the action to this Court on the basis of federal preemption under § 301 of the Labor-Management Relations Act ("LMRA"); specifically, USProtect asserted that the first amended complaint required interpretation of a collective bargaining agreement.

In November 2005, USProtect filed a motion for summary judgment or partial summary judgment. While that motion was pending, USProtect settled with each named plaintiff. Subsequently the Court allowed Geryl Doucette ("Doucette") to intervene as a party plaintiff. Her operative complaint alleges the following claims: (1) unpaid wages and for time worked and missed meal and rest periods; (2) failure to pay overtime compensation under California law; (3) waiting time penalties under California Labor Code § 203 for unpaid wages after termination of employment; (4) unjust enrichment for unpaid wages and expenses; (5)penalties under California Labor Code and Private Attorney General Act; (6) unfair competition under California Business and Professions code § 17200 et seq.; and (7) failure to pay overtime under the Fair Labor Standards Act ("FLSA").

II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49; *Barlow v. Ground*, 943 F. 2d 1132, 1134-36 (9th Cir. 1991).

III. DISCUSSION

A. First Claim To Extent Alleged Under California Labor Code § 226.7

Doucette's first claim alleges that USProtect has failed to pay Doucette and other class members wages earned as required by California Labor Code § 204, and additionally has failed to pay Doucette and other class members one hour of pay for each missed meal or rest period as required under California Labor Code § 226.7. USProtect moves for partial summary judgment to the extent claim 1 seeks recovery under § 226.7 on the ground that no private right of action exists under § 226.7. USProtect alternatively argues that to the extent a private right of action does exist, it carries a one-year statute of limitations and thus Doucette's claims are barred to the extent they arose more than one year before the filing of the original complaint in this case. Finally, USProtect argues that any recovery under § 226.7 is limited to a single payment of one additional hour's pay per day, whether the particular employee was denied one or more meal or rest period on that day. Doucette argues that *each* missed meal or rest period constitutes a separate violation of § 226.7, such that a particular employee may recover more than one hour of pay per day if more than one meal or rest period is denied.

Following completion of briefing on USProtect's motion, the California Supreme Court clarified that the additional hour of pay under § 226.7 constitutes a wage or premium pay and thus is governed by a three-year statute of limitations. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, ---, 155 P.3d 284, ---, 12 Wage & Hour Cas.2d (BNA) 833, 895 (2007).[4]

[4] As of the date of this order, pin citations are available only with respect to the BNA publication. All future citations will be to the BNA publication.

The *Murphy* decision does not squarely address the issue of whether a private right of action exists under § 226.7, and the question of whether § 226.7 creates a private right of action has not otherwise been addressed by the California Supreme Court. In the absence of authority from that court, this Court must use its best judgment to predict how that court would decide the issue. *See General Motors Corp. v. Doupnik*, 1 F.3d 862, 865 (9th Cir. 1993). This Court may look to the decisions of California appellate courts for guidance, but it is not bound to follow such decisions. *Id*. at 865 n.4.

This Court concludes that, although the question was not addressed directly, presumably because it was not raised by the parties, the California Supreme Court implicitly held in *Murphy* that a private right of action exists under § 226.7. Discussion of this implicit holding requires some understanding of the administrative and civil remedies generally available to wage claimants. The *Murphy* decision describes these remedies as follows:

> An employee pursuing a wage-related claim has two principal options. the employee may seek *judicial* relief by fling an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. Or the employee may seek *administrative* relief by filing a wage claim with the [commissioner] pursuant to a special statutory scheme codified in sections 98 to 98.8.

Murphy, 12 Wage & Hour Cas.2d (BNA) at 896 (internal quotation marks and citations omitted). "The Labor Commissioner has broad authority to investigate employee complaints and to conduct hearings in actions to recover wages, penalties, and other demands for compensation." *Id*. (internal quotation marks and citations omitted). This administrative process commonly is known as "the Berman hearing procedure." *Id*. "The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims." *Id*. The purpose of the procedure is "to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims." *Id*. (internal quotation marks and citations omitted). Any party may seek review of the Labor Commissioner's decision in a Berman proceeding by filing an appeal in the appropriate municipal or superior court. *Id*. The filing of such an appeal terminates the jurisdiction of the Labor Commissioner and vests jurisdiction in the appellate court to conduct a *de novo* hearing of the issues. *Id*. at 896-97.

Murphy commenced a Berman proceeding before the Labor Commissioner, asserting claims for unpaid overtime and waiting-time penalties against his former employer. Following the Commissioner's ruling in Murphy's favor, the employer sought *de novo* review in the superior court. During that *de novo* review process, Murphy sought to raise new claims for meal and rest period violations under § 226.7 and for itemized pay statement violations. Those claims had not been raised in the Berman proceeding. The superior court allowed Murphy to raise the new claims over the employer's objection. During the course of the superior court's *de novo* review of Murphy's claims, a question arose as to whether claims for meal and rest period violations under § 226.7 are governed by a one-year or a three-year statute of limitations. The superior court, concluding that a three-year statute of limitations governed, found for Murphy on his § 226.7 claims and on his other claims. The California Court of Appeal reversed in part, holding that Murphy could not raise new claims for the first time on *de novo* appeal from the Berman proceeding, and that a one-year statute of limitations applied to § 226.7 claims. The California Supreme Court granted Murphy's petition for review to address both questions.

With respect to Murphy's assertion of new claims under § 226.7 in the *de novo* appellate proceedings, the court stated as follows: "As the Court of Appeal here acknowledged, Murphy could have filed a separate civil complaint raising the additional wage claims, at which point the trial court could have consolidated the civil action with the *de novo* proceeding and considered all of the claims together." *Id*. at 898. In concluding that Murphy could have filed a civil complaint raising his § 226.7 claims even though those claims had not been raised in the administrative Berman proceeding, the court necessarily concluded that Murphy had the *right* to file a civil claim under § 226.7. Moreover, the court devoted the bulk of its lengthy decision to the question of whether a *civil claim* brought under § 226.7 is subject to a one-year statute of limitations or a three-year statute of limitations. There would have been no reason for the court to engage in this detailed analysis if no private right of action exists under § 226.7 in the first place.

It long has been established that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so

decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (holding that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions"). However, while *Murphy* may not constitute binding precedent as to this issue, it nonetheless is informative as to how the California Supreme Court would resolve the question of whether a private right of action exists under § 226.7.

Moreover, separate and apart from the implicit holding of *Murphy* discussed above, this Court concludes that *Murphy*'s explicit determination that the additional hour of pay under § 226.7 is a wage necessarily suggests strongly that claimants have a private right of action to recover that wage pursuant to California case law interpreting California Labor Code § 218. Section 218 reads in relevant part as follows: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article." Cal. Lab. Code § 218. A number of California appellate decisions have cited § 218 for the proposition that wage claimants have a direct right of action to seek unpaid wages. *See, e.g.*, *Reynolds v. Bement*, 36 Cal.4th 1075, 1084 (2005); *Smith v. Rae-Venter Law Group*, 29 Cal.4th 345, 350 (2002); *Sampson v. Parking Serv. 2000 Com, Inc.*, 117 Cal.App.4th 212, 220 (2004). Based upon these authorities, this Court concludes that a private right of action exists to recover wages owing under § 226.7.

In conclusion, after careful review of *Murphy* and the California cases addressing wage claimants' rights to sue for unpaid wages generally, this Court is persuaded that if squarely presented with the issue the California Supreme Court would conclude that there is a private right of action under § 226.7.

The Court concludes that whether a claimant may recover an additional hour's pay for each of multiple missed meal or rest periods in a single day is not an appropriate issue for summary judgment. Resolution of the issue will not dispose of "all or any part" of the first claim. *See* Fed. R. Civ. P. 56(b). The issue properly may be raised when and if liability is established under § 226.7.

Accordingly, summary judgment will be denied as to the first claim.

B. Third Claim For Waiting Time Penalties Under California Labor Code § 203

Doucette's third claim seeks waiting penalties under California Labor Code § 203, which provides in its entirety as follows:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.
>
> Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

Cal. Lab. Code § 203.

USProtect asserts that to the extent the third claim is based upon failure to pay the amounts owing under § 226.7, the claim must be dismissed, because the amounts owing under § 226.7 are penalties rather than wages, and thus are not covered under § 203. This argument does not survive *Murphy's* holding that amounts owing under § 226.7 are wages. Accordingly, summary judgment will be denied as to the third claim.

C. Sixth Claim For Violation Of Unfair Competition Laws

Doucette's sixth claim alleges that USProtect's failure to comply with various provisions of the California Labor Code constitutes unfair competition in violation of California Business & Professions Code § 17200. She seeks restitution of all funds owed as well as injunctive relief. USProtect argues that because Doucette has no private right of action under § 226.7, she cannot assert a § 17200 claim based upon failure to comply with § 226.7. USProtect also argues that even if there is a private right of action under § 226.7, amounts owing under that provision are penalties rather than wages, and therefore cannot be recovered as "restitution" under § 17200. This Court has concluded that there is a private right of action under § 226.7, and the California Supreme Court has clarified that the additional hour of pay under § 226.7 is a wage rather than a penalty. Accordingly, summary judgment will be denied as to the sixth claim.

D. Fourth Claim For Unjust Enrichment

Doucette's fourth claim alleges that USProtect obtained payments from the government that were to be passed through to employees as reimbursements for employee expenses in obtaining various trainings and certificates. Doucette alleges that USProtect kept these monies and did not pass them through to the employees. Doucette requests that USProtect be required to disgorge these monies. She also requests that, to the extent she cannot recover on her wage claims, USProtect be required to disgorge monies it was unjustly enriched by obtaining free labor during meal and rest periods.

"[T]here is no cause of action in California for unjust enrichment." *Melchior v. New Line Productions, Inc.*, 106 Cal.App.4th 779, 793 (2003). "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." *Id*. (internal quotation marks and citation omitted). "It is synonymous with restitution." *Id*. Accordingly, summary judgment will be granted as to the fourth claim. This ruling is without prejudice to Doucette's ability to seek restitution, where appropriate, in connection with her other claims.

E. Fifth Claim Under PAGA

Doucette's fifth claim is asserted under the Private Attorney General Act, California Labor Code § 2699 ("PAGA"). PAGA was enacted in 2003, effective January 1, 2004, to prescribe a civil penalty for existing Labor Code sections for which no civil penalty otherwise had been established and to allow aggrieved employees to bring a civil action to collect civil penalties previously available only in enforcement actions initiated by the State's labor law enforcement agencies. *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal.App.4th 365, 374 (2005). USProtect seeks a determination that Doucette's PAGA claim is barred to the extent that she seeks penalties for violations occurring prior to January 1, 2004, the statue's effective date.

"Under California law, as under federal law, statutes do not operate retrospectively unless the legislature plainly intended them to do so." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1079 (9th Cir. 2005) (internal quotation marks and citations omitted). "The presumption against retroactive legislation is deeply rooted in our jurisprudence because individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id*. (internal

quotation marks and citations omitted). In light of the fact that PAGA establishes new civil penalties for Labor Code violations and does not contain any clear indication that the legislature intended the statute to operate retrospectively, the Court concludes that Doucette's PAGA claim is barred to the extent that she seeks penalties for violations occurring prior to January 1, 2004.

USProtect also seeks a determination that the PAGA claim is barred to the extent that Doucette seeks payment of penalties for any Labor Code violations not expressly identified in the notice that the original plaintiffs in this action sent to the Labor and Workforce Development Agency ("LWDA"). Prior to bringing a PAGA claim, an employee must give written notice to the LWDA of the specific provision of the California Labor Code alleged to have been violated. Cal. Lab. Code § 2699.3(a)(1); *see also Caliber*, 134 Cal.App.4th at 376. The original plaintiffs in this action sent the requisite written notice in a letter dated October 28, 2004. That letter identifies the following Labor Code violations: (1) failure to pay for "guard mount time" in violation of Labor Code §§ 201, 202, 204 and 1199, and in violation of IWC Wage Order No. 4; (2) failure to provide rest periods in violation of Labor Code §§ 226.7, 516 and 1199, and in violation of IWC Wage Order No. 4; and (3) failure to provide reimbursement in violation of Labor Code §§ 2802 and 1199. Several of Doucette's claims are not identified in this letter (for example, her claim for failure to provide meal periods in violation of § 226.7). The Court concludes that Doucette has failed to exhaust administrative remedies with respect to such claims and therefore will grant partial summary judgment with respect to those claims not explicitly identified in the notice letter.

IV. ORDER

Defendant's motion for partial summary judgment is GRANTED as to the fourth claim, GRANTED IN PART as to the fifth claim, and otherwise DENIED.

DATED: 5/10/07

JEREMY FOGEL
United States District Judge

This Order has been served upon the following persons:

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